

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

76-1313 ^B_P

To be argued by
MICHAEL S. DEVORKIN

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1313

UNITED STATES OF AMERICA,

Appellee,

— — —
JOHN D'AMELIO, A Witness Before the Grand Jury,
Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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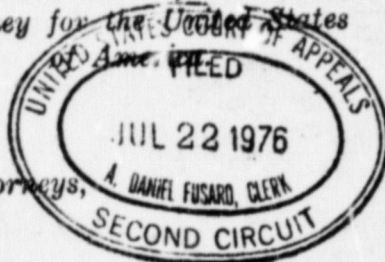


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**United States Court of Appeals
FOR THE SECOND CIRCUIT**

Docket No. 76-1313

UNITED STATES OF AMERICA,

Appellee,

—v.—

JOHN D'AMELIO, A Witness Before the Grand Jury,
Appellant.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

John D'Amelio appeals from an order entered on June 29, 1976, in the United States District Court for the Southern District of New York by the Honorable Whitman Knapp, United States District Judge, adjudging him in civil contempt as a recalcitrant witness pursuant to Title 28, United States Code, Section 1826.

Statement of Facts

On October 29, 1975, John D'Amelio was indicted in the Southern District of New York in Indictment 75 Cr. 1035 for selling cocaine and conspiring to do so. More specifically, D'Amelio was charged with providing William Zacchi with about one-half pound of cocaine in October, 1973, which Zacchi then sold to an undercover Drug Enforcement Administration Agent.

The trial commenced on April 5, 1976. During the trial William Zacchi was scheduled to appear as the principal Government witness against D'Amelio. However, during the trial, on April 5, 1976, Zacchi refused to testify, even after Judge Inzer B. Wyatt granted him immunity upon the Government's formal application pursuant to Title 18, United States Code, Sections 6002-03. Zacchi was then summarily held in criminal contempt by Judge Wyatt and sentenced to six months imprisonment pursuant to Rule 42(a) of the Federal Rules of Criminal Procedure. Thereafter, on April 9, 1976, D'Amelio was acquitted of the charges pending against him. He did not testify at his trial.

At the time of his acquittal, D'Amelio was served with a subpoena *duces tecum* commanding him to appear on April 26, 1976 and to testify and produce documents before a grand jury sitting in the Southern District of New York. On April 19, 1976, D'Amelio moved to quash the subpoena asserting that compelling his appearance before the grand jury and questioning him concerning the subject matter of his prior trial amounted to harassment and cruel and unusual punishment, and that his acquittal acted as a bar under the doctrines of double jeopardy and collateral estoppel. On April 21, 1976, Judge Charles L. Brieant denied the motion to quash. The appearance before the grand jury was later adjourned to June 29, 1976.

On June 29, 1976, D'Amelio appeared to testify before the grand jury, accompanied by his attorney Philip Edelbaum. Upon an initial assertion of his Fifth Amendment privilege, D'Amelio was temporarily excused, and upon formal application by the Government, Judge Whitman Knapp granted D'Amelio immunity pursuant to Title

18, United States Code, Sections 6002-03. (GX 1).^{*} Immediately thereafter, after a copy of Judge Knapp's immunity order had been given to D'Amelio and his attorney, D'Amelio was recalled to testify.

When D'Amelio reappeared before the grand jury, the immunity order was read to him and he stated that he understood that pursuant to the order he could no longer assert his privilege against self-incrimination. (Tr. 4-5). He was then asked the following questions (Tr. 5-6):

- (1) "Do you know William Zacchi?"
- (2) "Did you ever sell cocaine to him?"
- (3) "Did you ever buy cocaine from anyone else?"
- (4) "I want to ask you, do you know William Zacchi and whether you either bought or sold cocaine from him or to him."

D'Amelio refused to answer these or any other questions and was temporarily excused. After being recalled, the Assistant United States Attorney further explained the situation to D'Amelio to make sure D'Amelio understood his alternatives and the consequences of his decision. The Assistant repeated his earlier explanation of the protection of the immunity order and warned D'Amelio that "for refusing to answer questions after this order has been signed, that you may be sentenced to a term of imprisonment for the length of the grand jury which may be up to 18 months." (Tr. 7-8). After acknowledging that he understood, D'Amelio persisted in his refusal to answer any questions. (Tr. 8).

^{*} "GX" refers to Government Exhibits at the subsequent contempt hearing before Judge Knapp; and "Tr." refers to the transcript of that proceeding.

The Assistant United States Attorney then returned to Judge Knapp with D'Amelio and his attorney and, on the basis of the immunity order and D'Amelio's refusal to testify, asked Judge Knapp to hold D'Amelio in contempt and remand him immediately after sentencing him to a term of imprisonment. (Tr. 8).

Judge Knapp then made certain that D'Amelio fully understood the protections given to him by the immunity order. (Tr. 14-15). He also gave D'Amelio a full opportunity to explain why he refused to testify (Tr. 15-16) and provided D'Amelio's attorney a full opportunity to explain the legal justification for the refusal to provide testimony. (Tr. 10, 12, 16-18). The only reasons offered to establish legal cause for not testifying were those which had been advanced over two months earlier during the motion to quash:

"He is taking a stand on a principle that he has been acquitted otherwise this can go on forever and the government does not have a right to harass him and to make him suffer through unusual punishment as they are doing." (Tr. 17).

Judge Knapp concluded that the acquittal was irrelevant and found D'Amelio in civil contempt. However, he gave D'Amelio nine days to surrender and stated:

"In the meantime, between now and the 8th, if you serve a brief on me that changes my mind, I will consider it." (Tr. 22).

No brief or further application for relief or hearing was filed with the District Court.

D'Amelio is presently incarcerated under Judge Knapp's order.

A R G U M E N T

POINT 4

D'Amelio had sufficient notice of the contempt charges and an adequate opportunity to prepare and present his defenses.

D'Amelio argues that he was deprived of adequate notice of the charges against him and of an opportunity to prepare his defense. Contrary to D'Amelio's assertions, the record below establishes beyond any doubt that the defendant had a complete understanding of the proceedings and a full and fair opportunity to prepare and present his defenses.

It is well settled in this Circuit that pursuant to 18 U.S.C. § 1826(a), summary contempt procedures apply to recalcitrant witnesses facing civil contempt. *United States v. Handler*, 476 F.2d 709, 713 (2d Cir. 1973); *In re Persico*, 491 F.2d 1156, 1162 (2d Cir.), cert. denied, 419 U.S. 924 (1974). Nevertheless, it has been held that a witness before a grand jury "is basically entitled to the 'procedural regularities' prescribed by Rule 42(b) [of the Federal Rules of Criminal Procedure]." *In re Sadin*, 509 F.2d 1252, 1255 (2d Cir. 1975).^{*} But since

^{*} The vitality of *Sadin* with respect to *civil* contempt for recalcitrant grand jury witnesses is in doubt in light of *United States v. Wilson*, 421 U.S. 309 (1975), rev'g 488 F.2d 1231 (2d Cir. 1973). *Sadin* heavily relied on the Second Circuit's opinion in *Wilson* and cases such as *United States v. Pace*, 371 F.2d 810 (2d Cir. 1967) and *United States v. Marra*, 482 F.2d 1196 (2d Cir. 1973), holding that summary *criminal* contempt was unavailable against any recalcitrant witness because immediate punishment was not necessary to put an end to acts disrupting the proceedings. In reversing *Wilson*, the Supreme Court held that sum-

[Footnote continued on following page]

Section 1826(a) specifically provides for summary procedures, "certain concessions to ideal process necessarily must be made." *United States v. Handler, supra*, 476 F.2d at 713. As a consequence, all that is necessary is that the contemnor have adequate notice of the contempt proceeding against him in order to allow a reasonable opportunity to prepare his defense. *In re Di Bella*, 518 F.2d 955, 959 (2d Cir. 1975); *In re Sadin, supra*, 509 F.2d at 1256.

The requirement of notice and an opportunity to prepare is treated in a common sense, not a hypertechnical, fashion. Accordingly, formal notice is not necessary if the witness has actual notice of the nature of the proceedings against him, *United States v. Handler, supra*, 476 F.2d at 712-13, and the question of whether a defendant has had a reasonable opportunity to prepare a defense depends on the facts of each case. *In re Di Bella, supra*; *United States v. Hawkins*, 501 F.2d 1029, 1031 (9th Cir.), *cert. denied*, 419 U.S. 1079 (1974); *In re Sadin, supra*.

Thus, in *In re Di Bella, supra*, a witness was held in contempt on the same day as his refusal to testify after he and his counsel failed to justify the refusal to testify. 518 F.2d at 959. *Accord, In re Persico, supra*. In *In re Sadin, supra*, the contemnor was only given two days to meet with his newly appointed attorney in order to prepare a defense and persuade the judge to reconsider a judgment of contempt. Finally, in *United States v.*

mary contempt was clearly appropriate for a witness refusing to testify at trial, and the concurring opinion of two Justices reflects substantial sentiment to overrule or narrow *Harris v. United States*, 382 U.S. 162 (1965), and permit even summary criminal contempt for recalcitrant grand jury witnesses. Furthermore, even in light of *Harris*, the *Wilson* Court took note of the difference between civil and criminal contempt by observing that civil contempt involved *immediate* imprisonment. 421 U.S. at 317 n.9.

Hawkins, supra, the Ninth Circuit upheld a one day period to consider what to do as sufficient in view of *United States v. Alter*, 482 F.2d 1016 (9th Cir. 1973), on which D'Amelio relies.

In the instant case, it is manifest that D'Amelio had actual notice of the contempt proceedings well in advance of being held in contempt and had months in which to prepare a defense. On April 19, 1976, *over two months prior to being held in contempt*, D'Amelio moved to quash his grand jury subpoena on the identical grounds he advanced at the contempt hearing before Judge Knapp and now advances to this Court. The claims raised there of double jeopardy, collateral estoppel and cruel and unusual punishment clearly demonstrated D'Amelio's awareness even at that early date that a subsequent refusal to testify would expose him to contempt.

Moreover, on June 29th, when D'Amelio appeared before the Grand Jury, the Assistant United States Attorney was careful to make D'Amelio aware "of the specific acts for which he was exposing himself to contempt" and the possible remedial incarceration that could result. *United States v. Handler, supra*, 476 F.2d at 713. During that appearance D'Amelio took advantage of opportunities provided by the Assistant to consult with his attorney. D'Amelio then acknowledged to the grand jury that he fully understood that a consequence of his refusal to testify might well be incarceration for contempt.

This clear and unequivocal notice to D'Amelio of the charges about to be filed was followed that same day by Judge Knapp's careful explanation to D'Amelio of the charges which would be filed if he refused to testify. Judge Knapp also provided D'Amelio and his attorney a full opportunity to present their defenses to the Government's contempt application. It speaks volumes about

the defendant's claims, that after having had two months to prepare his defenses, D'Amelio then raised precisely the same legal arguments that he had asserted over two months earlier and which he now reasserts on appeal.

But even if these facts were not sufficient to demonstrate that D'Amelio received adequate notice of the charges and had a full opportunity to assert the only defenses available to him, Judge Knapp on June 29, 1976 adjourned D'Amelio's surrender date for nine days, stating that he was giving the defendant this extra time in which to prepare any additional papers which might cause the Court to reconsider its position (Tr. 22)—an event which has gone conspicuously unmentioned in D'Amelio's brief on appeal. Predictably, no additional papers were filed, and D'Amelio's brief on appeal contains not even a suggestion concerning what other issues he might have conjured up had there been additional notice of the charges.

In short, this was a case in which the defendant, represented at all times by experienced counsel, knew months in advance of his grand jury appearance that he was going to face contempt proceedings if he failed to testify. He had prepared purely legal defenses to these charges well before his appearance in the grand jury—defenses to which he has consistently and unswervingly adhered since April 21, 1976. To accept D'Amelio's argument that he was deprived of notice and an opportunity to prepare a defense would require this Court to blind itself to the realities of the proceedings conducted below.

POINT II

D'Amelio's acquittal does not bar a grand jury's inquiry into his knowledge of narcotics trafficking nor does it bar a contempt proceeding resulting from his refusal to testify.

D'Amelio argues that his acquittal on narcotics charges precludes the grand jury from inquiring concerning any knowledge he might have about the specific transactions which constituted the subject matter of his earlier trial. He further contends that he is being improperly harassed and subjected to the cruel dilemma of either testifying and opening himself up to perjury charges or not testifying and subjecting himself to contempt. He asserts that his arguments implicate the Double Jeopardy Clause, principles of collateral estoppel and the protection against cruel and unusual punishment. These claims are frivolous.

There is, to be sure, a certain surface appeal to D'Amelio's arguments. Were prosecutors to act as bad sports and serve every acquitted defendant with a grand jury subpoena, there could be no question that it would be appropriate for either the District Court or the Court of Appeals to employ their supervisory powers to curb any abuse. However, when the factual setting of the present case is examined, it becomes readily apparent that the abuses D'Amelio complains of exist in theory only.

During the grand jury proceedings which led up to D'Amelio's indictment on narcotics charges, William Zacchi, a co-conspirator, testified against the defendant. However, as the trial approached, Zacchi had a sudden change of heart and decided not to testify against D'Amelio at trial. This was done, quite obviously, either to protect D'Amelio, to protect others who may also have been

involved or because Zacchi feared retaliation from someone. Accordingly, Zacchi—who was granted immunity—refused to testify and was held in contempt by Judge Wyatt. Zacchi's silence was, we submit, largely responsible for D'Amelio's subsequent acquittal.

In this factual context, the Government cannot be faulted for believing that D'Amelio—who, because of a grant of immunity, will be protected against any further prosecution so long as he testifies truthfully*—may well have testimony which would aid the grand jury. The jury's verdict of not guilty was not after all a determination that the defendant lacked relevant information. It was simply a finding that, without the testimony of either Zacchi or the defendant (D'Amelio did not testify at his own trial), there existed a reasonable doubt about the defendant's guilt.

It is therefore readily apparent, as Judge Knapp recognized below, that this was not a case in which the Government abused the grand jury processes for vindictive purposes.** There exists a strong probability that D'Amelio is possessed of evidence of criminal wrongdoing by others, and the grand jury is, of course, entitled to that evidence, absent reliance upon a legitimate testimonial privilege. See *United States v. Calandra*, 414 U.S. 338 (1974); *United States v. Dionisio*, 410 U.S. 1 (1972); *Branzburg v. Hayes*, 408 U.S. 665 (1972).

* The only "dilemma" which D'Amelio faces is a product of his own making. True, if he perjures himself, this may lead to a jail term, and a refusal to testify has already placed him in civil contempt. However, truthful and forthright answers in the grand jury will permit D'Amelio to avoid any possible prosecution. See *In re Bonk*, 527 F.2d 120 (7th Cir. 1975).

** As to the timing of the service of the subpoena, the Government represents that the subpoena was prepared before the jury returned its final verdict and was to be served in the event of an acquittal or a conviction.

Putting aside D'Amelio's specious claims of bad faith and harassment, the arguments he advances, premised on principles of double jeopardy, collateral estoppel and cruel and unusual punishment are also totally unpersuasive. Double jeopardy and collateral estoppel, an ingredient of that Fifth Amendment guarantee, *United States v. Seijo*, Dkt. No. 75-1377, slip op. 4387, 4390 (2d Cir. June 24, 1976), protect only against being placed twice in jeopardy for the same offense or based upon the same ultimate facts. "It is multiple trials in this sense which the double jeopardy clause is designed to prevent." *United States v. Velazquez*, 490 F.2d 29, 34 (2d Cir. 1973), cert. denied, 421 U.S. 946 (1975); *United States v. Wilson*, 420 U.S. 332 (1975). As the Supreme Court has noted:

"[The Double Jeopardy Clause] protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense." *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969).

However, a grand jury proceeding is not a trial and the questions asked of D'Amelio did not place D'Amelio in jeopardy. See *United States v. Huss*, 482 F.2d 38, 51 (2d Cir. 1974). Grand jury proceedings, like disbarment proceedings,

"are not lawsuits between parties litigant but rather in the nature of an inquest or inquiry. . . . They are not for the purpose of punishment. . . ." *In re Echeles*, 430 F.2d 347, 349 (7th Cir. 1970).

Accordingly, double jeopardy and collateral estoppel principles, even in view of prior acquittals, have no application to such proceedings. See *Id.* at 352; *In re Doe*, 95

F.2d 386 (2d Cir. 1938); *Ex Parte Wall*, 107 U.S. 265, 230, 288 (1882).*

Indeed, the legal claims which D'Amelio asserts are squarely foreclosed by this Court's decision in *United States v. Castaldi*, 338 F.2d 883 (2d Cir. 1964), *vacated and remanded on other grounds*, 384 U.S. 886 (1966). There, Castaldi was acquitted on a narcotics conspiracy charge, subpoenaed by the grand jury to answer questions (some of which related to aspects of the narcotics conspiracy), and subsequently ordered to answer questions. After his refusal to answer these questions he was found in contempt of court and sentenced to two year's imprisonment. Castaldi then attacked unsuccessfully the contempt conviction on the same grounds raised by D'Amelio, namely "under principles of double jeopardy, *res judicata* and collateral estoppel." *Id.* at 884.

Although the Supreme Court vacated the contempt conviction on the grounds that different procedures should have been used, the following holding of the Second Circuit nevertheless remains undisturbed:

"[T]he acquittal in no way gave Castaldi permanent freedom to refuse to answer all questions relating to possible narcotics violations merely because they might have some connection with an earlier trial." *Id.*

* Moreover, it has long been recognized that civil sanctions may be imposed after acquittal on a criminal charge arising out of the same facts, since the civil action is remedial, not punitive in nature. *Stone v. United States*, 167 U.S. 178, 188 (1897); *Murphy v. United States*, 272 U.S. 630, 631, 632 (1926); *Helvering v. Mitchell*, 303 U.S. 331, 397-98 (1938); *One Lot Emerald Cut Stones v. United States*, 409 U.S. 232, 235 (1972).

As the court noted, an acquitted suspect who may have information bearing on an offense has no more right to keep silent before the grand jury than does an innocent bystander or a convicted participant.* The appearance before the grand jury is not a retrial. Nor does a defendant's acquittal "establish as a matter of law his lack of knowledge concerning narcotics traffic." ** *Id.* at 885. See also *United States v. Gebhard*, 426 F.2d 965, 968 (9th Cir. 1970).

* There can be little doubt that a defendant who has been convicted of a crime has no right to remain silent on matters concerning it. *Piemonte v. United States*, 367 U.S. 556 (1961); *Reina v. United States*, 364 U.S. 507 (1960); *In re Sadin*, *supra*, 509 F.2d at 1256; *United States v. Reide*, 494 F.2d 644 (2d Cir. 1974).

** Aside from the inapplicability of double jeopardy principles to the grand jury's non-adversarial, non-litigation, investigative process, this second aspect of the *Castaldi* decision alternatively disposes of D'Amelio's claims. For even in an adversarial context, D'Amelio would have the heavy burden of showing *with certainty* that the verdict at his trial *necessarily* determined in his favor the issue now raised. *United States v. Seijo*, *supra*; *United States v. Cala*, 521 F.2d 605, 608-09 (2d Cir. 1975); *United States v. Gugliardo*, 501 F.2d 68, 70 (2d Cir. 1974); *United States v. Tramunti*, 500 F.2d 1334 (2d Cir.), *cert. denied*, 419 U.S. 1079 (1974); *United States v. Cioffi*, 487 F.2d 492, 498 (2d Cir. 1973), *cert. denied sub nom. Ciuizio v. United States*, 416 U.S. 995 (1974). Quite obviously, when a jury acquits in a criminal case, it decides only that there is doubt as to some element of the offense, not that the accused is innocent, and much less that he has no relevant information about the offenses alleged and the involvement of others. For this additional reason, a criminal acquittal does not bar relitigation of the same issues in a subsequent civil action, *One Lot Emerald Cut Stones v. United States*, *supra*; *United States v. National Association of Real Estate Boards*, 339 U.S. 485, 492-94 (1950); *Helvering v. Mitchell*, *supra*; *Stone v. United States*, *supra*; *Neaderland v. Commissioner of Internal Revenue*, 424 F.2d 639, 641-42 (2d Cir.), *cert. denied*, 400 U.S. 827 (1970), and it cannot possibly bar a search for more information on these same issues.

D'Amelio's attempt to distinguish *Castaldi* is unavailing. He proceeds upon the incorrect assumption that Castaldi was not questioned about the specific acts for which he was earlier tried. It is clear, however, that some of the questions "related to aspects of the conspiracy" of which he was acquitted. 338 F.2d at 884.

Moreover, each of D'Amelio's arguments have only recently been rejected by the Seventh Circuit in the only other case we have been able to find squarely on point. *In re Bonk, supra*.

Accordingly, John D'Amelio's appearance before the grand jury was proper, and his acquittal was no shield against the questions put to him.

CONCLUSION

The District Court's order of contempt should be affirmed.

Respectfully submitted,

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